UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH TERRY, Plaintiff, v. CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Defendant.	Case No. 15 Civ. 9660 (RA) (SN)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)

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In accordance with the Court's order dated August 29, 2016 (Dkt. No. 35), Defendant Corporation for National and Community Service ("CNCS"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiff Elizabeth Terry brings suit *pro se* against CNCS, asserting various claims in connection with her participation in the Volunteers in Service to America, or "VISTA," Program administered by CNCS. Plaintiff's claims should be dismissed because she has not identified any applicable waiver of sovereign immunity, and thus the Court lacks subject matter jurisdiction over her Second Amended Complaint (Dkt. No. 22-1, the "SAC").[1] As a participant in the VISTA program, Plaintiff was a volunteer and not a federal employee per the governing statutory scheme; therefore, she cannot assert claims under federal employment statutes for unpaid wages, unemployment insurance, overwork, or wrongful termination. Nor does the Contract Disputes Act provide a waiver of sovereign immunity to the extent Plaintiff's allegations are framed as breach of contract claims. The Court also lacks jurisdiction over Plaintiff's negligence claim against CNCS. While the Federal Tort Claims Act ("FTCA") provides a waiver of sovereign immunity as to certain tort claims, the United States is the only proper defendant to a claim under the FTCA, and Plaintiff has failed to plead exhaustion of her administrative remedies, a jurisdictional prerequisite to suit under the FTCA.

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[1] On June 17, 2016, Plaintiff filed the SAC, which is the operative complaint, attaching a letter she previously filed on June 16, 2016 (Dkt. No. 21). Her June 16, 2016 letter, in turn, references certain documents attached to Plaintiff's letter of May 10, 2016, which the Court deemed to be her first Amended Complaint. (Dkt. No. 19, "FAC.") The page numbers referred to herein for the FAC and the SAC are the ECF-numbered pages in Dkt. Nos. 19 and 22-1, respectively.

Even if the Court had jurisdiction over Plaintiff's claims, her claims should be dismissed for failure to state a claim. The documents attached and integral to the SAC demonstrate that Plaintiff was fully paid the monetary allowance promised to her for the period in which she was enrolled in the VISTA program, and she has alleged no other contractual or other legal obligation on the part of CNCS. Plaintiff has also failed to state a negligence claim because she fails to allege that she suffered any injury in connection with CNCS's alleged negligence.

FACTUAL BACKGROUND

I. CNCS and the VISTA Program

CNCS is the federal agency that administers the VISTA program, pursuant to the Domestic Volunteer Service Act of 1973 ("DVSA"), 42 U.S.C. § 4950 *et seq*.[2] Individuals who serve in a national service position through the VISTA program are VISTA members. VISTA members are required to make a "full-time personal commitment to combating poverty and poverty-related problems," and, to the extent practicable, "to live among and at the economic level of the people served, and to remain available for service without regard for regular working hours." 42 U.S.C. § 4954.

VISTA members serve at an approved VISTA project, operated by a public or nonprofit entity that has been approved by CNCS to be a VISTA sponsor. (Declaration of Jessica Vasquez, dated September 26, 2016 ("Vasquez Decl.") ¶ 4.) After interviewing a VISTA candidate, a VISTA sponsor will make a recommendation to the CNCS State Office with oversight responsibility for the VISTA project that the individual be approved for service with the sponsor. (*Id.*) Upon approval of the CNCS State Office, the recommended individual is assigned to the recommending sponsor's VISTA project. (*Id.*)

[2] CNCS is a wholly owned government corporation as defined in 5 U.S.C. § 103, and an executive agency as defined in 5 U.S.C. § 105.

During the course of a VISTA member's participation, CNCS provides the member with a living, or subsistence, allowance. 42 U.S.C. § 4955(b). The monetary living allowance is modest and varies depending on the geographic location where a VISTA member serves. (Vasquez Decl. ¶ 5.) CNCS may also provide VISTA members with other service-related benefits, such as allowances for travel, health benefits, and other support that the Director of the VISTA program at CNCS deems appropriate. (*Id.*) Upon successful completion of service as a VISTA member, the member is eligible to receive either an end-of-service cash stipend in the amount of $1,500 for a full term of service or a Segal AmeriCorps Education Award. (*Id.*)

VISTA members are expressly deemed not to be federal employees, except for a few specifically designated purposes that are explicitly stated in the DVSA.[3] 42 U.S.C. §5055(a)-(e). These purposes include the Hatch Act, the Federal Tort Claims Act, the Federal Employee's Compensation Act, and certain provisions of federal statutes concerning credit toward retirement and seniority if a VISTA member, after completing VISTA service, accepts employment with the federal government. *Id.*

VISTA members are enrolled for a period of one year. 42 U.S.C. § 4954. The regulations promulgated by CNCS in place at the time of Plaintiff's participation in the VISTA program[4] set forth a procedure for the early removal of a volunteer from the program. *See* 45 C.F.R. Part 1210. According to those regulations, a sponsoring organization may request that a VISTA member be removed from service at that organization. 45 C.F.R. § 1210.3-2. If the State Director of the VISTA program is not able to resolve the issue, the VISTA member is placed on administrative hold. *Id*. So long as the circumstances surrounding the request for removal do not present facts sufficient to support a termination for cause, the VISTA member will be given an opportunity to seek another assignment. If such placement is not possible, then the VISTA member will be terminated from the VISTA program for lack of suitable assignment, a non-cause termination. *Id.*

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[3] A VISTA member is also not deemed to be an employee of her sponsor organization. *See* 42 U.S.C. § 5044.

[4] Regulations governing the VISTA program were previously codified at 45 C.F.R. §§ 1210-1232 (2015). In January 2016, updated regulations governing the VISTA program were issued. The updated regulations are located at 45 C.F.R. Part 2556. VISTA service prior to January 2016 is governed by the regulations in 45 C.F.R. §§ 1210-1232 (2015).

II. Plaintiff's VISTA Membership

Plaintiff was a member of the VISTA program for the period August 30, 2014 through February 25, 2015. (Vasquez Decl. ¶ 7.) She was initially placed with World Cares Center ("WCC"), a non-profit organization located in New York. (SAC at 4; Vasquez Decl. ¶ 7.)

As set out in an August 1, 2014 letter from CNCS attached to Plaintiff's FAC, in connection with her assignment to WCC, Plaintiff was to receive an annual living allowance of $15,312 for a year of service. (FAC at 3.) For each bi-weekly pay period in which Plaintiff was a VISTA member for 14 days, she was paid a bi-weekly installment of $587.30 before taxes, or $41.95 per calendar day. (FAC at 5-6; Vasquez Decl. Ex. A.)[5] The total amount of subsistence allowance paid to Plaintiff was $7,551. (Vasquez Decl. Ex. A.)

On January 26, 2015, CNCS placed Plaintiff on administrative hold in connection with her position as a VISTA member serving at WCC and provided her with an opportunity to locate another VISTA assignment. (FAC at 8.) Plaintiff was unable to do so, and therefore Plaintiff's VISTA service was terminated as of February 25, 2015. (*Id.*) Because she still had status as a VISTA member while on administrative hold, Plaintiff received the VISTA living allowance that accrued during that time. (*Id.*) With her last living allowance payment, Plaintiff received a pro-rated end-of-service stipend of $739.80. (Vasquez Decl. Ex. A at 14.)

[5] For the first and last biweekly pay periods, Plaintiff received less than 14 days' worth of allowance because she was not a VISTA member for the entirety of those two pay periods. (Vasquez Decl. Ex. A at pages 1 & 14.)

III. Plaintiff's Complaint

Plaintiff appears to allege six claims in the SAC. First, Plaintiff alleges that she was underpaid wages for the time period during which she was a VISTA member. (SAC at 5.) Second, Plaintiff alleges that she was denied unemployment insurance after her VISTA assignment was terminated. (*Id.*) Third, Plaintiff alleges that she was given an "unreasonable work load" at her VISTA site because CNCS failed to find replacements for other VISTA volunteers who left their positions at that site. (*Id.*) Fourth, Plaintiff alleges that she was not provided the education she expected in connection with her VISTA membership because an educational certificate she received does not reflect the name of Bank Street College of Education. (*Id.*) Fifth, Plaintiff alleges that CNCS was negligent in connection with a cyber-intrusion carried out against the Office of Personnel Management ("OPM"). (*Id.*) And finally, Plaintiff includes as a basis for jurisdiction an allegation that she was "wrongfully laid off (i.e. terminated)" and states in the June 16, 2016 letter attached to her SAC that she was "wrongfully laid-off from [her] VISTA . . . assignment" (SAC at 2, 5), although she seeks no relief in connection with those allegations (*see id.* at 4).

ARGUMENT

I. Legal Standards

Through this motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, CNCS moves to dismiss Plaintiff's claims for lack of subject matter jurisdiction and, alternatively, for failure to state a claim. "A Rule 12(c) motion for judgment on the pleadings based upon a lack of subject matter jurisdiction is treated as a Rule 12(b)(1) motion to dismiss the complaint." *U.S. ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 448-49 (S.D.N.Y. 2001); *see id.* at 448 ("Although subject matter jurisdiction is usually challenged by way of a Rule 12(b)(1) motion to dismiss, it may also be raised on a Rule 12(c) motion for judgment on the pleadings."). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Cruz v. AAA Carting & Rubbish Removal, Inc.*, 116 F. Supp. 3d 232, 239 (S.D.N.Y. 2015) (internal quotation marks omitted). A Court considering a Rule 12(c) motion asserting lack of subject matter jurisdiction "may consider materials extraneous to the pleadings without converting the motion into one brought under Rule 56." *Dean v. Town of Hempstead*, 163 F. Supp. 3d 59, 64 (E.D.N.Y. 2016).

"The standard for granting a Rule 12(c) motion for failure to state a claim "is identical to that of a Rule 12(b)(6) motion." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). The court must accept as true all factual allegations contained in the complaint and draw all reasonable inferences in the non-moving party's favor. *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010). To survive a Rule 12(c) motion for failure to state a claim, "the complaint 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

On a 12(c) motion for failure to state a claim, "the court considers 'the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.'" *L–7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (quoting *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009)). A complaint is "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *Id.* (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004)) (internal quotation marks omitted).

II. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims

A. CNCS Has Not Waived Sovereign Immunity as to Plaintiff's Purported Employment Claims

Plaintiff's claims for unpaid wages, unemployment insurance, overwork, a new educational certificate, and wrongful termination must fail because CNCS has not waived sovereign immunity as to those claims. "'[T]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). "The doctrine of sovereign immunity is jurisdictional in nature, and therefore to prevail, the plaintiff bears the burden of establishing that her claims fall within an applicable waiver." *Id.* (citations omitted).

Plaintiff has not established any applicable waiver of sovereign immunity that would permit these claims to proceed. To the extent that Plaintiff's claims are styled as employment claims, Congress has provided for judicial review of certain claims brought by federal employees. *See, e.g.*, *United States v. Fausto*, 484 U.S. 439, 446 (1988) (noting that the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 7121 *et seq.*, the governing statutory scheme for federal employee personnel actions, permits certain categories of federal personnel to seek review by the Federal Circuit of agency decisions concerning personnel actions based on job performance); *El-Sheikh v. United States*, 177 F.3d 1321, 1323-24 (Fed. Cir. 1999) (Congress waived sovereign immunity over certain claims by federal employees under the Fair Labor Standards Act of 1974 ("FLSA"), 29 U.S.C. § 201 *et seq*., by amending the FLSA to cover federal employees).

However, neither the CSRA nor the FLSA, nor any other statute, provides Plaintiff with a means to sue the government because Plaintiff, as a VISTA volunteer, was never a federal employee. Pursuant to 42 U.S.C. § 5055, VISTA volunteers are not to be deemed federal employees "and shall not be subject to the provisions of laws relating the Federal officers and employees and Federal employment." As reflected in the legislative history of DVSA's predecessor statute,[6] these include laws "relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits . . . ." H.R. Rep. No. 88-1458 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2900, 2959; *see also Cameron v. Wofford*, 955 F. Supp. 1319, 1322-23 (D. Kan. 1997) (noting that "Congress has expressly stated that a VISTA volunteer shall not be considered a federal employee"). Because Plaintiff is not considered a federal employee for the purposes of laws governing federal employment, any waiver of sovereign immunity for suits by federal employees cannot provide the Court with jurisdiction over her claims.

Nor does the DVSA itself provide a waiver of sovereign immunity for the claims brought by Plaintiff here. The DVSA does require the VISTA Director to establish a procedure, "including notice and opportunity to be heard, for volunteers . . . to present and obtain resolution of grievances and to present their views in connection with the terms and conditions of their

[6] DVSA's predecessor statute was the Economic Opportunity Act of 1964, which created the original VISTA program.

service." 42 U.S.C. § 4954(d). CNCS promulgated regulations establishing such a procedure, and the version of those regulations in place at the time of Plaintiff's service define a "grievance" as any "matter arising out of, and directly affecting, the volunteer's work situation, or a violation of those regulations governing the terms and conditions of service resulting in the denial or infringement of a right or benefit to the grieving volunteer." 45 C.F.R. § 1211.1-4. But the regulations make no mention of judicial review, nor do they purport to waive sovereign immunity.[7]

To the extent Plaintiff frames her claims as claims for breach of a contract with CNCS, such claims must also fail. Claims arising from express or implied contracts with the federal government for the "procurement of services" are governed by the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. § 7101 *et seq*. Judicial disputes under the CDA must be brought before the United States Court of Federal Claims. *See Melton v. Comey*, No. 03 Civ. 1614, 2003 WL 22939108, at *2 (S.D.N.Y. Dec. 12, 2003) (dismissing contract claim brought by interpreter against U.S. Attorney's Office for lack of subject matter jurisdiction because claim was governed by CDA). Therefore, the CDA does not provide Plaintiff with a basis to raise any contract-based claims before this Court.

B. Plaintiff's Negligence Claim Should Be Dismissed for Failure to Meet the Jurisdictional Requirements of the FTCA

Finally, Plaintiff claims that CNCS was "negligen[t]" in connection with a cyber-intrusion into the records of OPM, which resulted in the theft of background investigation records. (SAC at 5.) Plaintiff attached to her FAC a letter from OPM indicating that her Social

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[7] CNCS has promulgated separate regulations to address volunteer claims of discrimination, and those regulations do authorize volunteers to file a civil action after exhausting the agency procedures to address certain claims of discrimination. 45 C.F.R. § 1225.21. Plaintiff does not allege discrimination in the SAC. Plaintiff raised a vague claim of "wage discrimination" in her July 25, 2016 letter to the Court (Dkt. No 30). Per the Court's July 29, 2016 Order (Dkt. No. 31), however, the Court rejected Plaintiff's letter to the extent it sought to amend the complaint.

Security Number and other personal information, as well as her fingerprints, were affected by the intrusion. (FAC at 2.) Plaintiff's fingerprints were provided by CNCS to OPM as part of a fingerprint-based background check requested by CNCS prior to her enrollment as a VISTA member. (Vasquez Decl. ¶ 6.)

Any negligence claim by Plaintiff must be dismissed pursuant to the FTCA. The FTCA "constitutes a limited waiver by the United States of its sovereign immunity" for tort suits against a government employee or agency. *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998). Under the FTCA, "only the United States may be held liable for torts committed by a federal agency, and not the agency itself." *C.P. Chem. Co. v. United States*, 810 F.2d 34, 37 n.1 (2d Cir. 1987); *see also Rivera v. United States*, 928 F.2d 592, 609 (2d Cir. 1991) (affirming dismissal of FTCA claim against Drug Enforcement Administration for lack of subject matter jurisdiction because "the only proper federal institutional defendant in such an action is the United States"). Because Plaintiff names CNCS, and not the United States, as the defendant in her negligence claim, her claim should be dismissed for lack of subject matter jurisdiction.

Moreover, to properly maintain a claim under the FTCA, a plaintiff "must comply with several strictly construed prerequisites to suit." *Glover v. United States*, 111 F. Supp. 2d 190, 192 (E.D.N.Y. 2000). Among these prerequisites is the requirement that "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied" before she may bring a suit against the United States. 28 U.S.C. § 2675(a). This requirement "is jurisdictional and cannot be waived." *Celestine v. Mt. Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005); *see also Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (no subject matter jurisdiction where plaintiff "failed to first present his claim to the appropriate agency"). "The burden is on the plaintiff to both plead and prove compliance with the statutory requirements." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987). "In the absence of such compliance, a district court has no subject matter jurisdiction over the plaintiff's claim." *Id.*

Plaintiff has not alleged that she administratively raised her negligence claim with any agency.[8] Therefore, even if Plaintiff had properly named the United States as a defendant, her negligence claim should be dismissed for failure to plead exhaustion.

III. Plaintiff Fails to State a Claim for Breach of Contract or Negligence

Even if the Court had subject matter jurisdiction over Plaintiff's claims, any contract-based claims asserted by Plaintiff must fail because, as is evident from the SAC and documents incorporated by reference or otherwise integral to the SAC, there was no breach of contract. The only allegation in Plaintiff's SAC that could be construed as asserting a breach of contract by CNCS is her claim that she was underpaid. Specifically, Plaintiff alleges that she was "underpaid by approximately $102 per month" by CNCS during the period of her appointment as a VISTA volunteer. (SAC at 5.) This number appears to be the difference between the monthly breakdown of Plaintiff's annual living allowance set out in the August 1, 2014 letter of $1,276 (FAC at 3), and twice the biweekly allowance of $587.30 that Plaintiff actually received (*Id.* at 5).

Plaintiff's claim is based on a miscalculation. As reflected in the allowance statements Plaintiff attaches to the FAC, she received an allowance of $587.30 every fourteen days, or $41.95 per day. (*Id.* at 5-6.) Had Plaintiff worked for a full term of service, or 365 days, she would have received $15,311.75 for the year for her allowance. Rounded to the nearest dollar,

[8] As a factual matter, Plaintiff has not raised her administrative claim with CNCS. (Declaration of Thomas L. Bryant, dated September 20, 2016, ¶ 3.)

that number exactly matches the amount set forth in the August 1, 2014 letter – $15,312 for a year of service. As the complete set of allowance statements[9] provided to Plaintiff during this period make clear, Plaintiff was fully paid for the period of time in which she served as a VISTA member: having served from August 30, 2014 through February 25, 2015,[10] Plaintiff received a subsistence allowance of $41.95 per day for a total of 180 days, or $7,551. (Vasquez Decl. Ex. A.)

Plaintiff's claim arises, therefore, not from any breach of CNCS's promises to her in connection with her living allowance, but from a discrepancy between what the living allowance would be if paid in 12 equal installments, and the actual biweekly breakdown of that allowance. In short, the documents incorporated by and integral to Plaintiff's SAC show that CNCS simply did not breach any contract that may have existed with the Plaintiff to pay specific amounts during her VISTA membership.

As to Plaintiff's claim for overwork, neither the August 1, 2014 letter of enrollment nor any other document Plaintiff has addressed in the SAC includes any commitment by CNCS that Plaintiff would work a particular set of hours in her position; indeed, the DVSA establishes that VISTA volunteers will be available to their communities "without regard for" working hours. 42 U.S.C. § 4954. Similarly, there is no allegation that Plaintiff was promised unemployment

[9] The Court may consider the complete set of allowance statements attached to Ms. Vasquez's declaration because (1) Plaintiff attached some, but not all, of these statements to her FAC; (2) Plaintiff received all of these account statements during her term as a VISTA member; and (3) these statements are integral to Plaintiff's claim that she did not receive the subsistence allowance promised to her. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (deeming contracts integral to complaint where complaint relied on their terms and effects); *Martino v. Metro N. Commuter R.R. Co.*, No. 10 Civ. 1816, 2013 WL 3208548, at *5 (D. Conn. June 24, 2013) (determining that Court could consider, on a 12(c) motion, documents that Plaintiff "had notice of and relied upon . . . in framing the complaint").

[10] Although CNCS's notice of termination to Plaintiff indicated that she would only receive subsistence allowance earned through February 24, 2015 (FAC at 8), she was paid through February 25 (Vasquez Decl. Ex. A at pages 13 &14).

insurance, and indeed each of the allowance statements that Plaintiff received expressly informed her that the payments were not wages for the purposes of unemployment insurance laws. (FAC at 5-6; Vasquez Decl. Ex. A.) Thus, any contractual claim that Plaintiff asserts in connection with her alleged overwork and inability to collect unemployment benefits must fail because there was never any contract between her and CNCS that set such terms.

Plaintiff complains that her certificate of completion for a training course she took does not display the name of Bank Street College of Education, a private institution. In connection with this claim, Plaintiff attaches to the FAC a Certificate of Completion for a "VISTA Blend" course on resource development and the related syllabus. (FAC at 9-17.) Neither the syllabus nor any other allegation in the SAC suggests that Plaintiff should have received a certificate displaying Bank Street College of Education's name on it, or that the training course would somehow be accredited by Bank Street College of Education. Nor has Plaintiff pointed to any statutory, regulatory, or contractual obligation on the part of CNCS to provide any particular education or educational opportunities. If Plaintiff chose to use her VISTA allowance or her end-of-service cash stipend to enroll in a course with an educational institution, and was unhappy with the results she received, she must take up her grievance with that institution.

As to Plaintiff's vague statements that she was "wrongfully terminated," she makes no specific allegations concerning her termination in the SAC, nor does she describe any relief she seeks in connection with any allegedly wrongful termination. Even construed liberally, the SAC does not state a claim for wrongful termination. As reflected in the February 25, 2015 letter informing Plaintiff of her termination (FAC at 8), CNCS placed Plaintiff on administrative hold and provided her with an opportunity to obtain another VISTA assignment. During that period, CNCS continued to provide Plaintiff with her subsistence allowance. (*Id.*; Vasquez Decl. Ex. A at 13-14.) She was only terminated after she was unable to find a suitable reassignment. (FAC at 8.) Thus, Plaintiff's termination was in accordance with CNCS's regulations. *See* 45 C.F.R. Part 1210. Plaintiff makes no allegations to the contrary, and her bare assertion that she was wrongfully terminated simply cannot support Plaintiff's claim. *See Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal quotation marks omitted).

Finally, Plaintiff's negligence claim fails because she has not alleged any injury caused by any alleged negligence by CNCS in connection with the cyber intrusion experienced by OPM. Indeed, as reflected in the letter from OPM informing Plaintiff of the intrusion (FAC at 2), OPM was "not aware of any misuse of [Plaintiff's] information." In any event, OPM offered Plaintiff "credit monitoring, identity monitoring, identity theft insurance and identity restoration services" for the next three years. Plaintiff's SAC makes no mention of whether Plaintiff had to avail herself of any of these services, much less that her identity has been stolen or that she has otherwise suffered any harm from the security breach. Plaintiff's negligence claim should therefore be dismissed for failure to state a claim. *See Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365, 2008 WL 763177, at *3 (S.D.N.Y. Mar. 20, 2008) (dismissing negligence claim based on theft of company's customer data where alleged injuries were "solely the result of a perceived and speculative risk of future injury that may never occur" and plaintiff "failed to show an actual resulting injury that might support a claim for damages").

CONCLUSION

For the foregoing reasons, Defendant CNCS respectfully requests that the Court dismiss this action for lack of subject matter jurisdiction and, in the alternative, for failure to state a claim.

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Respectfully submitted,

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